IN THE

Supreme Court of the United States

October Term 1978

No. 77-1680

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

GARY DeFILLIPPO,
Respondent.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Attorney General of California is the chief law officer of the state, whose duty it is to see that the laws of the state of California are uniformly and adequately enforced. (Cal. Const., art. V, § 13.)

Among these statutes is California Penal Code section 647(e), which defines as a misdemeanor the conduct of a person "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The legal and constitutional significance of this California statute is substantially similar to that of the Detroit ordinance under consideration in this case. The people of California thus have a vital interest in this Court's resolution of the constitutionality of Detroit Municipal Code section 39-1-52.3.

SUMMARY OF ARGUMENT

The public interest in suppression and detection of crime has found expression through the centuries in various statutes proscribing vagrancy and loitering. The majority of these statutes, derived from the English common law, focused upon status rather than conduct. Such statutes have in recent years been held unconstitutional, often as being too vague to provide that fair warning essential to the just operation of criminal laws.

The Detroit ordinance, however, like the current California statute, differs in significant respects from the older statutes. The Detroit ordinance authorizes a request for identification only in specifically defined objective circumstances, fully amenable to judicial review. The requirement for identification itself does not involve any form of self-incrimination. Because the Detroit ordinance, like the California statute, is neither overly broad nor vague, focuses upon conduct rather than status, and involves no breach of the privilege against self-incrimination, the decision of the court below was in error and should be set aside, and the constitutionality of the Detroit ordinance affirmed.

ARGUMENT

THE DETROIT ORDINANCE, WHICH FOCUSES UPON CONDUCT RATHER THAN STATUS, IS A CONSTITUTIONAL EXPRESSION OF THE POLICE POWER

The Detroit ordinance, like the California statute, is a modern restatement of a principle of societal organization having ancient roots in the western heritage. For at least eight hundred years, statutes in England and later in America have proscribed vagrancy and loitering. (Sherry, Vagrants, Rogues and Vagabonds--Old Concepts in Need of Revision (1960) 48 Cal.L.Rev. 557, 557-560.)

As one court has recognized,

> "Antiloitering statutes have been the source of much legislative and judicial difficulty [citations]. They represent an arena for conflict between healthy antipathy to the 'roust' or arrest on suspicion, on the one hand, and legitimate interests in crime prevention, on the other. Security against arbitrary police intrusion is basic to a free society [citation]. Thus, arrests on mere suspicion offend our constitutional notions. Frequently they amount to arrest for status or condition instead of unlawful conduct. . . .
>
> "At the opposite side of the scale is the view that law enforcement officers need not wring their hands in constitutional frustration while nighttime prowlers and potential thieves and rapists skulk

through our neighborhoods. . . ."
(People v. Bruno (1962) 211 Cal.
App.2d Supp. 855, 859.)

The fundamental nature of this conflict, and the consequent legislative difficulty in drafting appropriate statutes in response to these clear concerns, should be kept in mind in an analysis of the Detroit ordinance.

A. Analysis

At the time of Mr. DeFillippo's arrest, Detroit Municipal Code section 39-1-52.3 read as follows:

> "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity."

The identity of this ordinance with the California statute is plain. The objective behavior necessary to authorize a request for identification in California is loitering or wandering in circumstances such as to indicate to a reasonable man that the public safety demands identification. This

is simply the logical equivalent of the Detroit ordinance's requirement that the request be preceded by "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity".

Two factors should be noted with respect to both the California statute and the Detroit ordinance: (1) Each focuses upon conduct, rather than status, as a necessary foundation for a request for identification, and (2) each statute sets forth an objective test, fully amenable to judicial review, by which the legality of an intrusion in any particular case may be determined.

These factors differentiate the Detroit ordinance from older vagrancy statutes. Prior to 1961, for example, in California former Penal Code section 647.6 defined as a misdemeanant vagrant "[e]very person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business . . .". The unconstitutionality of the former vagrancy statutes was extensively analyzed by Professor Sherry in his article cited above.

In that article Professor Sherry also observed that while the vagrancy law was archaic, quaint, a symbol of injustice, and at variance with prevailing standards of constitutionality, it had survived to meet a particular need. This particular need, which cannot be overstated, is that law enforcement agencies must possess means to ". . . discharge their primary function of preserving law and order and preventing the commission of crime." (48 Cal.L.Rev. at p. 566.)

One proposed revision of the former vagrancy statutes in California completely omitted any language such as that contained in the present California statute and the Detroit ordinance. That bill was vetoed by the Governor of California precisely because it failed to provide any kind of control over those whose conduct afforded police officers legitimate occasion for suspicion. (48 Cal. L.Rev. at p. 571, n. 73.)

What emerged from this process in California was the current statute, which (like the Detroit ordinance) differs markedly from the older vagrancy laws.

B. The Ordinance Is Not Void For Vagueness

Vague statutes violate due process of law because they offend several important values. First, they fail to give fair notice to a person that his contemplated conduct is forbidden by the statute. (Parker v. Levy (1974) 417 U.S. 733, 752; Smith v. Goguen (1974) 415 U.S. 566, 572; Lanzetta v. New Jersey (1939) 306 U.S. 451, 453.) "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (United States v. Harriss (1954) 347 U.S. 612, 617; Palmer v. City of Euclid (1971) 402 U.S. 544, 546.) Second, impermissibly vague statutes may result in arbitrary and discriminatory enforcement by law enforcement officials and triers of fact. (Smith v. Goguen, supra, at pp. 572-573; Grayned v. City of Rockford (1972) 408 U.S. 104, 108-109; Papachristou v. City of Jacksonville (1972) 405 U.S. 156, 162; United States v. Reese (1876) 92 U.S. 214; Comment, Recent Supreme Court Developments of the Vagueness Doctrine (1974) 7 Conn.L. Rev. 94, 100-105.) Third, such a statute

may "abut upon sensitive areas of basic First Amendment freedoms," operating "to inhibit the exercise of [those] freedoms . . .." (Baggett v. Bullitt (1964) 377 U.S. 360, 372; see Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67, 75; Comment, 7 Conn.L.Rev., supra, at pp. 105-115.)

Nevertheless, "lack of precision is not itself offensive to the requirements of due process." (Roth v. United States (1957) 354 U.S. 476, 491. "[T]he Constitution does not require impossible standards." (United States v. Petrillo (1947) 332 U.S. 1, 7.) "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." (Id. at p. 7; Miller v. California (1973) 413 U.S. 15, 27, n. 10.) "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (Nash v. United States (1913) 229 U.S. 373, 377.) A jury may be asked to determine whether conduct is "reasonable." (See United States v. Ragen (1942) 314 U.S. 513, 523.) Although this Court requires a precise statute proscribing specific conduct where First Amendment interests are affected (see Grayned v. City of Rockford, supra, 408 U.S. at 109, n. 5; Smith v. California (1959) 361 U.S. 147, 151), this "Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression." (Winters v. New York (1948) 333 U.S. 507, 517.)

The ordinance herein is asserted to be unconstitutionally vague. Yet under Terry v. Ohio (1968) 392 U.S. 1, a peace officer is entitled to detain, frisk, and interrogate a person whose conduct raises a reasonable suspicion of criminal activity. Under Terry a policeman may act when his information warrants the belief by a man of reasonable caution that official intrusion is appropriate. (392 U.S. at pp. 20-21.) As precisely as possible, this standard is set forth in Detroit Municipal Code section 39-1-52.3, as authorizing the request for identification.

Thus the circumstances which trigger the officer's inquiry are to be measured, as is probable cause to arrest, by weighing the factors known to the officer at the time. An arrest may thereafter only be made for refusal to provide identification. Both factors focus on the conduct, rather than the status, of persons such as Mr. DeFillippo. Because this conduct is weighed against an objective standard, the ordinance is clearly sufficiently definite, and provides fair warning.

Nothing in Papachristou, supra, is to the contrary. That case involved the ancient traditional vagrancy ordinance predicating criminality on status alone, with the preamble to the statute in that case defining vagrants to include "[r]ogues and vagabonds, or dissolute persons who go about begging . . .". (405 U.S. at p. 156, n. 1.) As noted above, the Detroit ordinance focuses upon conduct, not status.

Similarly, this Court's decision in Palmer v. City of Euclid, supra, does not control the present matter. The ordinance in Palmer, supra, made it criminal to wander the streets late at night and not

give a satisfactory account of oneself. There were no objective standards by which the statute might be applied, and thus no reasonable notice of what might be unlawful was provided by the ordinance. (402 U.S. at p. 546.) By contrast, as noted above, Detroit Municipal Code section 39-1-52.3 only becomes operative with reference to a specifically articulable objective set of facts.

Because the Detroit ordinance is only violated by one who behaves in such a manner as to provide reasonable cause for a detention, and thereafter refuses to identify himself, the statute is neither void for vagueness nor overbroad. It gives adequate notice of prohibited activities. As this Court noted in another case, "[w]e agree with the [lower] court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . .'". (Colten v. Kentucky (1972) 407 U.S. 104, 110. See also the excellent analysis of this point in People v. Solomon (1973) 33 Cal.App.3d 429, 432-435; cert. den. 415 U.S. (1974).

C. A Requirement to Identify In Specifically Defined Circumstances Is Constitutional

The court below held the Detroit ordinance unconstitutional because of its supposed vagueness, and also because that court believed "[w]hile police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions, [citation] there can be no requirement that the person answer." (262 N.W.2d 921, 924.)

Although not articulated, it appears the point of the holding was that such a requirement would violate the Fifth Amendment. To the contrary, there is no constitutional impediment to requiring identification in specifically defined circumstances such as those arising under the Detroit ordinance.

The court below relied upon statements in Davis v. Mississippi (1969) 394 U.S. 721, 727, n. 6, and Terry v. Ohio, supra, 392 U.S. at p. 34. In those cases, however, this Court was dealing with questioning going beyond the requirement for identification. It is of course clear that answers may not be compelled in a process of custodial interrogation. In a case involving precisely the same objection to California Penal Code section 647(e) as the court below found to the Detroit ordinance, the California courts have accurately observed that "[t]o the extent that the questions pertain to identification we disagree [that there is a constitutional right to refuse to answer]." (People v. Solomon, supra, 33 Cal.App.3d at p. 436.) As that court went on to observe:

> "It is within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional rights. [Citations.] We find that the legislative power employed here to compel identification is consistent with constitutional right." (Ibid.)

The distinction between a disclosure of identity and disclosure of other information, not made by the court below, is well settled in the cases of this Court. In a recent case this Court has addressed the problem of "balancing the public need on the one hand, and the individual claim to constitutional protections on the other" with respect to an identification requirement. (California v. Byers (1971) 402 U.S. 424, 427-428.) That opinion went on to state that:

> "Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the 'extravagant' extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. . . . Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." (402 U.S. at pp. 431-432.)

As the California courts have recognized, in situations such as the present one

> ". . . the public need involved, protection of society against crime, is strong; while the individual right involved, anonymity when loitering on the streets under suspicious circumstances, is weak. We view the balance between identification

> and anonymity in the case of a loiterer on the streets under circumstances reasonably thought to involve the public safety as falling on the side of identification." (People v. Solomon, supra, 33 Cal.App. 3d at pp. 436-437.)

All of these matters were put in proper perspective in another case involving California Penal Code section 647(e). In People v. Weger (1967) 251 Cal.App.2d 584, Justice Fleming makes some observations concerning the duty to identify.

> "This duty to identify and account I find substantially similar to the duty of a motorist on the highway to identify himself and establish his right to be on the highway, to demonstrate his condition to exercise that right safely, and to report accidents involving property damage, personal injury, or death. [Citations.] It is comparable to the duty to identify and account which we fulfill at the demand of the building superintendent when we enter our offices late at night, which we satisfy at the demand of customs and immigration inspectors when we return from overseas, which we carry out at the demand of the Director of Internal Revenue when we file our income tax returns. These inquisitions, oral and written, sometimes inconvenient, sometimes vexing, are part of the price we pay to insure domestic tranquility and promote the general welfare.

> "The theory that one owes no duties to one's neighbors and is under no obligation to render even small assistance to the public order by identifying and accounting for oneself and thus releasing a peace officer for other work, derives from the exaggerated and extreme individualism of another era, an individualism reflected in the statement of a Vanderbilt, 'The public be damned,' and similarly reflected in the structures of a Proudhon against all government. The theory is essentially anarchistic and hostile to all law, and it implies that the relationship of the citizen to public authority is comparable to that of the inhabitants of a conquered province to an army of occupation, who recognize no legal obligations owed to their temporary masters and whose relationship with them is based entirely on force. But in a society based on law the pure theory of individualism must defer to a reasonable accommodation between private privilege and public interest. When the public safety reasonably demands identification at 2:30 in the morning, the citizen has no constitutional right to remain anonymous." (251 Cal.App.2d at pp. 604-605, footnote omitted.)

In sum, it is abundantly clear a requirement to identify does not involve compelled self-incrimination. It is also clear that the state may impose this requirement in varying circumstances, and has.

No constitutional impediment appears to utilization of that same power to require identification in specifically defined circumstances such that it reasonably appears there is a basis for further investigation of criminal activity and the public safety therefore requires such identification. Because the court below erred in its constitutional analysis of this question, the Detroit ordinance is not in violation of any provision of the United States Constitution.

D. Other Jurisdictions

The court below relied upon People v. Berck (1973) 32 N.Y.2d 567, and United States ex rel. Newsome v. Malcolm (2d Cir. 1974) 492 F.2d 1166. The former case, by a 4-3 vote, held that a New York statute, similar to the Detroit ordinance and the California statute, was unconstitutional. The latter case simply agreed with the state court.

The Berck court interpreted the New York statute as permitting an arrest merely for loitering in suspicious circumstances. (32 N.Y.2d at pp. 569-570.) That court felt the statute was unconstitutionally vague, and compared it to a presumably adequate Model Penal Code provision. (32 N.Y. 2d at p. 573, n. 5.) The Malcolm decision followed this reasoning.

These cases are not in point, however, because the offense, as defined by the Detroit ordinance and the California statute, is refusal to identify oneself in circumstances which provide the "founded suspicion" which justifies an investigative stop and inquiry. (See Wade v. United States (9th Cir. 1972) 457 F.2d 335, 336, for an excellent example of a situation in which

detention and inquiry is justified although probable cause for arrest does not exist.) In other words, the existence of probable cause for investigation when coupled with a refusal to identify constitutes the offense. Authority from jurisdictions construing other statutes in an entirely different manner is not in point, and should not be considered.

CONCLUSION

The problem sought to be addressed by the Detroit ordinance is clear. For example, the presence of a person lingering late at night in the back alleys of a business district which has suffered a high burglary rate clearly warrants investigation by police officers. Consistent with the need to preserve public order and prevent crime, the city of Detroit may constitutionally require such persons to identify themselves. To forbid such reasonable police activity would itself be an unreasonable intrusion into the constitutional power of a legislative body to define offenses in the interest of public safety, and would be an abrogation of this Court's duty to uphold statutes, particularly those dealing with offenses difficult to define, so long as no first amendment values are implicated. (Winters v. New York, supra, 333 U.S. at p. 517.)

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For all of the reasons set forth above, Detroit Municipal Code section 39-1-52.3 is clearly constitutional, and it is respectfully urged that this Court reverse the judgment below and affirm the constitutionality of this narrowly drawn and necessary ordinance.

Respectfully submitted,

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